No. 98-55

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1997

BURL CAIN, WARDEN,
Petitioner,

versus

ELMO HUMPHREY, III,
Respondent.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The Petition correctly identifies the parties.

TABLE OF CONTENTS

Page

PARTIES TO THE PROCEEDING i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT 1

SUMMARY OF OPPOSITION 2

REASONS FOR DENYING THE WRIT 4

I. THE EN BANC FIFTH CIRCUIT DECISION RESOLVED, BUT DID NOT CREATE, A SPLIT AMONG THE CIRCUITS 4

A. The En Banc Fifth Circuit Decision Is In Accord With The Two Other Circuits To Address Question Two 5

B. The "Circuit Split" Urged in Question One is Illusory 6

1. The State concedes that under *Winship* and its progeny, including *Cage* and *Victor*, each charge must be reviewed as a whole 6

2. No case outside of the Fifth Circuit has even confronted a charge simultaneously containing all of the erroneous definitions found to be unconstitutional in *Cage* since *Cage* was decided 6

II. THIS COURT'S OPINION IN *VICTOR* HAS ALREADY PROVIDED GUIDANCE AND A STANDARD THAT WAS FOLLOWED BY THE FIFTH CIRCUIT 7

A. The Lower Courts Require No Further Guidance 8

B. Louisiana Should Follow The Guidance Already Provided By This Court And The Fifth Circuit 9

III. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR MODIFYING *CAGE* OR *VICTOR* 10

TABLE OF AUTHORITIES

Page

Cases

Adams v. Aikens,
41 F.3d 1175 (4th Cir. 1994) 5

Boyde v. California,
494 U.S. 370 (1990) 3, 6, 8, 9

Buchanan v. Angelone,
118 S. Ct. 757 (1998) 8

Cage v. Louisiana,
498 U.S. 39 (1990) ..... *passim*

Estelle v. McGuire,
502 U.S. 62 (1991) 6, 8

Harmon v. Marshall,
69 F.3d 963 (9th Cir. 1995) 5

Holland v. United States,
348 U.S. 121 (1954) 6

In re Smith,
142 F.3d 832 (5th Cir. 1998) 10

In re Winship,
397 U.S. 358 (1970) 4, 5, 6

Nutter v. White,
39 F.3d 1154 (11th Cir. 1994) 5

Ramirez v. Hatcher,
136 F.3d 1209 (9th Cir. 1998) 5

Simmons v. South Carolina,
512 U.S. 154 (1994) 8

Skelton v. Whitley,
950 F.2d 1037 (5th Cir. 1992) 5

State v. McDaniel,
410 So. 2d 754 (La. 1982) 10

State v. Sullivan,
623 So. 2d 1315 (La. 1993) 9

State v. Sullivan,
688 So. 2d 1245 (La. Ct. App. 1997) 9

Sullivan v. Louisiana,
508 U.S. 275 (1993) 4, 5, 8

Tanner v. United States,
483 U.S. 107 (1987) 9

Teague v. Lane,
489 U.S. 288 (1989) 5

United States v. Shunk,
113 F.3d 31 (5th Cir. 1997) 5
Victor v. Nebraska,
511 U.S. 1 (1994) ..... *passim*

Statutes

28 U.S.C. § 2254(e)(2)(A)(1) 10
La. Code Crim. Pro. art. 782 2
La. Code Evid. 606 9

STATEMENT

This is a habeas corpus case. The underlying prosecution stemmed from a recovered memory of sexual abuse between six and eight years before the indictment. The Respondent, Elmo Humphrey, was charged with aggravated rape, a capital offense in Louisiana carrying an automatic life sentence. This was alleged to be his first criminal offense.

The Fifth Circuit's Opinion, reproduced at Pet. App. 17, fairly summarizes the relevant events.[1] Respondent's accuser was a troubled young woman with substantial and conceded credibility problems. She testified to physical abuse at the Respondent's hands, although she could not remember when. She could only recall that it all took place while her family lived in Metarie, Louisiana. She also testified that her family moved in early 1981, which would have been well outside the applicable limitations period. That issue was raised at trial and in this habeas proceeding. It is raised in this Court in the Conditional Cross-Petition for Certiorari.

The prosecution began the trial by suggesting to the venire that Respondent had confessed during voluntary interviews with the police. Just the opposite was true, although the actual statements were never introduced. The trial court denied a motion for mistrial.

Aware its case turned on a single credibility assessment of one problematic witness, the State offered the testimony of an "expert" in the so-called child-abuse-accommodation-syndrome. This expert testified, in essence, that the complainant's credibility and memory problems were in fact symptoms of rape. Respondent's objection to this testimony was overruled. Shortly after the

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[1] Oddly, the Petition assails the Fifth Circuit for recounting the facts and suggesting that the question of guilt was uncomfortably close. To the Petitioner, the Respondent's guilt or innocence is irrelevant and should not inform the analysis. Notably, however, the Petition itself succumbs to the temptation to relate only those aspects of the trial that are favorable to the State.

conviction in this case, the Louisiana Supreme Court, joined by virtually every other state court to consider this issue, found this expert testimony so "inherently unreliable" that it should play no role in a criminal trial.

On top of all of this, in defining reasonable doubt for the jury, the trial court employed the same three mis-definitions of that phrase that were condemned as unconstitutional by this Court in *Cage*. In addition, the instruction told the jurors that they should have "a serious doubt for which you could give good reason" if they were to vote not guilty. The jury divided over the question of guilt or innocence. As Louisiana law permits conviction on concurrence of ten jurors, even in capital cases, La. Code Crim. Pro. art. 782, Respondent was sentenced to life imprisonment at hard labor without possibility of parole.

On direct appeal, the Louisiana intermediate court of appeals rejected all of Respondent's claims, including his argument that the jury instruction had violated due process. The Louisiana Supreme Court refused to hear this case. Two months later it rejected identical arguments in *Cage*. Shortly thereafter, this Court granted certiorari in *Cage* and reversed.

Respondent exhausted state habeas without securing relief. This was his first application for federal habeas relief. The district court denied relief. The Fifth Circuit appointed counsel and, sitting en banc, reversed, having found the instruction given at Respondent's trial denied him due process under *Cage* and *Victor*. It ordered that Respondent be released or retried.

SUMMARY OF OPPOSITION

The Fifth Circuit's holding was correct. This Court's *Cage* decision and its more recent decision in *Victor* confirm that an instruction simultaneously mis-defining reasonable doubt as "grave uncertainty," "substantial doubt" and "moral certainty" is unconstitutional. Adding a

requirement that jurors possess "a good reason" for not convicting, as this instruction did, simply underscores that conclusion.

The Fifth Circuit also correctly applied the standards set forth by this Court in *Victor* and *Boyde* for reviewing jury instructions. It did not suffer from any confusion over how this standard should be applied. Contrary to Petitioner's assertions, this is not an area in need of further "guidance" from the Court.

While the Petition urges that the Fifth Circuit's decision in this case has somehow created a split among the circuits, just the opposite is true. Prior to its decision in this case, the Fifth Circuit was alone in denying retroactive application to this Court's *Cage* decision. The en banc decision resolved that conflict. It correctly held that *Cage* is available retroactively because it applied a rule that implicates accuracy and relates to the fundamental fairness of the proceeding. Indeed, it is also likely that *Cage* did not even announce a "new rule" of constitutional law so as to raise the question of its retroactivity.

Lastly, the Petition argues that the Fifth Circuit created a circuit split by its decision on the merits. As explained more fully below, it did not. Rather, it correctly applied three recent decisions of this Court confirming the existence of a due process violation and its consequence. No other circuit has held to the contrary. Indeed, no other has even addressed an instruction such as the one at issue here.

REASONS FOR DENYING THE WRIT

I. THE EN BANC FIFTH CIRCUIT DECISION RESOLVED, BUT DID NOT CREATE, A SPLIT AMONG THE CIRCUITS

In its Petition, Louisiana claims that the panel opinion, Pet. App. 17, as adopted by the *en banc* court, Pet. App. 1, somehow created a circuit conflict. In fact, it resolved an ongoing conflict between the Fifth Circuit and two other circuits.

This Court decided in 1970 that the due process guarantee carried the requirement of proof beyond a reasonable doubt to any state court proceeding in which a citizen's liberty is in jeopardy. *In re Winship*, 397 U.S. 358 (1970). In *Cage v. Louisiana*, 498 U.S. 39 (1990), the Court unanimously held that an instruction, essentially identical to the one given here, mis-defined "reasonable doubt" and thereby reduced the state's burden of proof. In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), the Court held that an error in defining reasonable doubt is a structural error in a trial too basic to be subjected to harmless error review.

In *Victor v. Nebraska*, 511 U.S. 1 (1994) the Court contrasted two instructions, one from California and another from Nebraska, from the one given in *Cage* and in this case and found that several critical distinctions existed. Among other differences, Victor's instruction did not contain the combination of errors that Cage's had. Thus, it did not present the risk "that the jury would interpret the term 'substantial doubt' in parallel with the preceding reference to 'grave uncertainty,' leading to an overstatement of the doubt necessary to acquit." *Id.* at 1250.

In its Petition, the State urges that yet another opinion -- the fourth of this decade -- is necessary to provide further guidance. It argues, in connection with a case in which a conviction leads to an automatic life sentence, that an instruction containing each of the three mis-definitions of reasonable doubt condemned in *Cage* together with a definition requiring jurors to convict

unless they have a "good reason" not to, does not violate the Due Process Clause. It also argues, in its second question presented, that judicial review of the due process violation in this case was barred by the Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989). This Opposition will address those arguments in reverse order below.

A. The En Banc Fifth Circuit Decision Is In Accord With The Two Other Circuits To Address Question Two

The Fifth Circuit panel found itself bound by another panel's opinion[2] to conclude that an error sounding under *Winship*, as applied in *Cage* and its progeny, is subject to the bar of *Teague v. Lane*, 489 U.S. 288 (1989), which precludes retroactive application of "new rules" of constitutional law in habeas proceedings, barring a recognized exception. The Eleventh and Fourth Circuits had previously held to the contrary. *Nutter v. White*, 39 F.3d 1154, 1158 (11th Cir. 1994); *Adams v. Aikens*, 41 F.3d 175, 179 (4th Cir. 1994). Following an even earlier Fifth Circuit decision,[3] these two circuits concluded that this Court's decision in *Cage* did in fact state a "new rule" of constitutional law. However, taking their cue from *Sullivan v. Louisiana*, 508 U.S. 275 (1993), both of these circuits concluded that *Cage* is nonetheless retroactively available under *Teague's* second exception allowing for retroactive application of rules "central to an accurate determination of innocence or guilt." *Teague*, 489 U.S. at 319.

Until the en banc decision in this case came to the same conclusion as the Fourth and Eleventh Circuits, the Fifth Circuit was the only federal circuit in disagreement. The Ninth Circuit recently came to a parallel conclusion with respect to the application of *Sullivan*. *Harmon v. Marshall*, 69 F.3d 963 (9th Cir. 1995); *see also Ramirez v. Hatcher*, 136 F.3d 1209, 1215 (9th

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2 *United States v. Shunk*, 113 F.3d 31, 37 (5th Cir. 1997).

3 *Skelton v. Whitley*, 950 F.2d 1037 (5th Cir. 1992).

Cir. 1998) (Op. of Reinhardt, J.) (urging retroactivity of *Cage*). Thus, every circuit to address this issue has now agreed that an error under *Cage* that allows a conviction on proof below the beyond reasonable doubt standard is available for review in a habeas corpus proceeding brought under 28 U.S.C. § 2254.

B. The "Circuit Split" Urged in Question One is Illusory

In its first question presented, Louisiana claims that the Fifth Circuit created a conflict when it ruled that the combination of the three mis-definitions of reasonable doubt highlighted in *Cage* with yet another violates due process. Notwithstanding this supposed "conflict," the State does not cite a single case from any court, state or federal, addressing these errors. Rather, it cites cases dealing with other instructions.

1. The State concedes that under *Winship* and its progeny, including *Cage* and *Victor*, each charge must be reviewed as a whole

No one questions the proper standard by which an instruction should be reviewed. The instruction, read as a whole, must "correctly convey the core concept of reasonable doubt." *Holland v. United States*, 348 U.S. 121 (1954). The question becomes whether "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (quoting *Boyde v. California*, 494 U.S. 370 (1990)). The Fifth Circuit applied that standard. Pet. App. 25.

2. No case outside of the Fifth Circuit has even confronted a charge simultaneously containing all of the erroneous definitions found to be unconstitutional in *Cage* since *Cage* was decided

Once one accepts the state's own argument as true -- that these decisions turn on a reading of an instruction in its entirety -- its asserted conflict evaporates. No case in any Circuit, before this one, involved all of the mis-definitions found in *Cage* to deny due proceed together

with a definition requiring the jurors to convict unless they had "good reason" for voting not guilty.

Certainly, no conflict can be implied from the cases cited in the Petition. In those cases, the First, Second and District of Columbia Circuits expressed disapproval for the language, highlighted in the Petition as having been repeated here, defining reasonable doubt respectively as a doubt "for which some good reason could be given" or one for "for which you can give a reason." None of those instructions is otherwise similar to this one. As the Fifth Circuit stressed, no court had confronted the "array of reasonable doubt qualifiers" presented in this case. Pet. App. 29.

The Fifth Circuit's opinion in this case simply found that the *Cage* errors combined with the erroneous requirement that jurors be prepared to offer a "good reason" for a not guilty verdict "[left] the instruction beyond constitutional repair." Pet. App. 32. It did not create any conflict with any court outside of the Fifth Circuit. Neither did it attempt to depart from earlier decisions from within the Fifth Circuit, considering similar instructions and holding that the combination of the three *Cage* errors was not itself sufficient to deny due process. Pet. App. 32.[4]

II. THIS COURT'S OPINION IN *VICTOR* HAS ALREADY PROVIDED GUIDANCE AND A STANDARD THAT WAS FOLLOWED BY THE FIFTH CIRCUIT

The Petition's final argument is two-fold. It urges that the Court should review this case to provide guidance to lower courts generally. It also claims that Louisiana is in need of further guidance and, in particular, a reversal in this case.

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[4] While this case involves additional error, the question whether an instruction that contains all of the *Cage* errors, as this one did, appears to be fairly included within Louisiana's question. Rule 14(1)(a).

A. The Lower Courts Require No Further Guidance

The Petition suggests, Pet. 15, that the Court "has not reviewed an instruction alleged to be violative of *Cage* under the modified standard of *Victor v. Nebraska*." *Victor* makes explicitly clear that *Cage* stands as an example of an unconstitutional instruction. *Victor*, 511 U.S. at 16 & 20-21. It should also be clear that *Victor* did not modify the standard by which jury instructions are reviewed. As the Petition later acknowledges, the Court's decision in *Boyde v. California*, 494 U.S. 370 (1990), which pre-dated both *Cage* and *Victor*, clarified the standard of review of jury instructions, requiring consideration of whether it is reasonably likely that the jurors applied the instruction in an unconstitutional standard.

Boyde itself acknowledged that the distinction between "various phrasings" may not have suggested any great difference. *Id.* at 379. Nonetheless, Louisiana urges that further guidance in the application of the *Boyde* standard is needed. While Louisiana suggests that the Court has not the applied the *Boyde* standard, it has.[5] Indeed, the *Victor* opinion itself applied that standard and provided "guidance" that was followed by the Fifth Circuit here. Pet. App. 25.

Moreover, the Petition's understanding of the *Sullivan* decision in connection with this argument is difficult to fathom. It argues that the Court in *Sullivan* found the instruction as a whole not to violate *Cage*. Pet. 15. To the contrary, this Court accepted the admission that the *Sullivan* instruction was virtually identical to the one in *Cage* and thus violated due process. *E.g.*, 508 U.S. at 277 & 282 (Op. of Rehnquist, C.J.). The Louisiana Supreme Court adhered to this Court's mandate, found the instruction unconstitutional on remand and ordered a new trial. *State*

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5 *Buchanan v. Angelone*, 118 S. Ct. 757 (1998); *Simmons v. South Carolina*, 512 U.S. 154 (1994); *Victor*, 511 U.S. at 5; *Estelle v. McGuire*, 502 U.S. 62, 73 (1991).

v. Sullivan, 623 So. 2d 1315 (La. 1993). Sullivan was then retried and convicted. *State v. Sullivan*, 688 So. 2d 1245 (La. Ct. App. 1997).

The related argument, Pet. 18, borrowed from the dissent below, that the Fifth Circuit somehow erred in applying the "reasonable likelihood" standard by attempting to determine how the jurors likely perceived the instructions is even more difficult to understand. The *Boyde* standard demands inquiry into the instruction's likely effect upon the jurors, as would any other standard. Unless the rule is to be changed to permit the taking of affidavits from the jurors themselves,[6] a reviewing court can only gauge the probable reaction of the jurors by examining the language used in the instruction. The Petition and the dissent below offer no alternative. Rather, they implicitly suggest that there should be no review at all.

B. Louisiana Should Follow The Guidance Already Provided By This Court And The Fifth Circuit

Lastly, the Petition urges that the Fifth Circuit's decision will create havoc. It claims that many people with instructions identical to this one are in its prisons and that they have been there so long that it would be difficult for the State to retry them. The Petition does not claim to have surveyed the State's prison population and it is not clear whether it purports to speak for the State or merely the Parish filing the Petition.

If it is in fact true, as the Petition claims, that many people have been tried and convicted in Jefferson Parish or Louisiana using a definition of reasonable doubt that required the jurors to have "a good reason" to vote not guilty and contained three other mis-definitions of reasonable doubt that standing alone were condemned as unconstitutional by Louisiana's Supreme Court in

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[6] *Tanner v. United States*, 483 U.S. 107, 125 (1987); La. Code Evid. 606.

1982[7] and this Court in 1990, the question might be put to the Petitioner. Why, after all of this, and especially six years after this Court announced that an error such as this is so basic that it is as if these people had not had the benefit of a guilty verdict, have none of these people been retried before now?

While the Petition (at 24) cites, 28 U.S.C. § 2254(e)(2)(A)(1), in support of its claim that the Fifth Circuit has created an urgent need for review, it misquotes the statute. The Fifth Circuit's decision in this case will not open the "floodgates" by announcing that *Cage* is a new rule that was previously unavailable. The statute permits future successive filings only if *this Court* takes this or some other case on certiorari and holds (1) that *Cage* was a "new rule" and (2) that it is retroactively available. *E.g.*, *In re Smith*, 142 F.3d 832 (5th Cir. 1998). The first issue is raised in this case by Conditional Cross-Petition.

III. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR MODIFYING *CAGE* OR *VICTOR*

As the Fifth Circuit's opinion suggests, this was not a typical habeas corpus case. The question of the defendant's guilt was "a close and difficult" one. Pet. App. 33. There were many errors affecting the basic fairness of the proceedings and confidence in the result. If the Court is interested in revisiting any aspect of the decisions in *Cage* and *Victor*, the State suggests in its Petition that there will be many other opportunities for doing so in the future. If the Petition is granted in this case, however, the Court should also grant the Cross Petition so as to preserve its opportunity to achieve a just result.

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[7] *State v. McDaniel*, 410 So. 2d 754, 756 (La. 1982).

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was served by First Class United States Mail this 7 day of August, 1998 upon counsel of record for Petitioner, pursuant to Rule 29 at the following address:

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